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Changing FERC Policies for Gas Pipelines?

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Introduction

On December 21, 2017, the newly appointed chairman of the Federal Energy Regulatory Commission (FERC) announced that the commission would undertake a review of its permitting policies and procedures for interstate natural gas pipelines. The U.S. natural gas pipeline network has expanded rapidly to accommodate new supplies of domestic shale gas. That expansion has prompted numerous congressional hearings and legislative proposals related to pipeline development. The review of FERC's permitting policies may provide stakeholders a new opportunity to influence how the commission considers such projects. Any resulting changes to FERC's permitting approach could affect U.S. natural gas resource and infrastructure development.

FERC's Pipeline Policy Statement

Under the Natural Gas Act of 1938, a developer seeking to construct, extend, acquire, or operate a facility for the transportation of natural gas in interstate commerce must obtain from FERC a certificate of public convenience and necessity. The commission exercises this certification (permitting) authority through its own regulations and under the guidance of its 1999 *Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities*. The policy statement lays out FERC's "policy for determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest." The statement outlines a "flexible balancing process" within which the commission considers market support; economic, operational, and competitive benefits; and environmental impact, among other factors.

Key Policy Issues

FERC has not yet finalized the process and content of its policy review. However, in remarks at a February 13, 2018, meeting of the National Association of Regulatory Utility Commissioners (NARUC), the FERC chairman named two specific issues for policy review: environmental review and the types of contracts used to determine pipeline market need. In addition to these issues, several other aspects of FERC's current practices may be considered because they recently have been the subject of FERC dissent, debate in Congress, or litigation in federal court. These issues are summarized below.

- **Environmental Review**. FERC is obligated under the National Environmental Policy Act (NEPA) to identify and consider the environmental impacts of proposals it may approve. That process involves identifying a proposal's direct and indirect effects. To date, FERC has limited its review of certain upstream or downstream (both are indirect) impacts, claiming that they are not reasonably foreseeable. However, in February 2017,

an outgoing FERC commissioner argued that FERC should analyze the upstream environmental effects of increased natural gas production and should be "open to analyzing the downstream impacts of the use of natural gas." Courts have generally agreed with FERC's interpretation when indirect impacts cannot be identified. Nonetheless, in a recent legal challenge to a pipeline in Florida for which the effects of natural gas use *could* be identified, the court ruled that FERC must "either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so." Two commissioners raised objections to FERC's environmental analysis in its subsequent order responding to the court decision.

- **Evaluating Project Need**. Some stakeholders have questioned FERC's reliance on contracts from future customers to prove market need and its project-by-project evaluation approach—especially where multiple projects are proposed in the same region. Consistent with this view, in October 2017, one current FERC commissioner dissented from the approval of two pipelines through Virginia on the grounds that both projects might not be needed due to geographic proximity. S. 1314 would require FERC to jointly consider two closely adjacent pipeline proposals in such cases. In his NARUC remarks, the FERC chairman also questioned developers' use of capacity commitments from their own affiliates to show market need.
- **Relations with Other Agencies**. Natural gas pipelines typically require permits from federal and state agencies in addition to FERC. Some in Congress argue that pipeline reviews "are being delayed unnecessarily due to a lack of coordination or insufficient action among agencies involved." In a related development, FERC has faced litigation for issuing a proposed pipeline's water quality permits—which were initially denied by a state agency—on the grounds of excessive delay by the state.
- **Changes in Industry Structure**. Since 1999, there have been fundamental changes in the structure of the U.S. natural gas sector, including widespread use of hydraulic fracturing, new gas production regions (e.g., Marcellus formation), increasingly interconnected natural gas infrastructure, and greater dependence on natural gas to fuel power plants. These changes, in turn, have introduced new considerations in pipeline permit review, including new concerns about greenhouse gas emissions, potential groundwater and seismic risks, pipeline safety, and energy infrastructure security.
- **Infrastructure for Export**. The rapid growth in U.S. natural gas production has supported growing exports of pipeline gas to Canada and Mexico, and of liquefied natural gas to overseas buyers. Some analysts have questioned whether FERC may evaluate pipelines proposed primarily to facilitate natural gas exports differently from pipelines proposed primarily to supply domestic markets.

As noted above, FERC has provided few details on the process and scope of its pipeline policy review. As the review continues, Congress may examine or comment on specific issues within the commission's existing regulatory framework, or it may direct specific policy outcomes through legislative action. Given that the United States is the world's largest producer of natural gas, any significant policy changes by FERC affecting natural gas infrastructure will likely be subject to scrutiny within Congress and among a wide range of stakeholders. Until the scope of the policy review is better defined, however, what specific policy changes are possible remains an open question.

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